No. 16530

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

B. A. WILLIAMS II,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court
for the District of Hawaii.

APPELLANT'S OPENING BRIEF.

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Jurisdictional Facts.

This case involves an appeal from United States District Court for the District of Hawaii wherein defendant appellant B. A. Williams, II, was convicted upon six counts of mail fraud violation of 18 U. S. C. Section 1341 upon information filed by the United States Attorney for the District of Hawaii [Record, pp. 4-8 incl.]. Indictment for violating the same statute was waived by appellant who consented that the proceeding might be had by information instead of by indictment [Record, p. 3].

This Court has jurisdiction to hear this appeal from the District Court for the District of Hawaii pursuant to the provisions of 28 U. S. C. A. Section 1291. The cited statutory section provides that the Court of Appeals shall have jurisdiction of appeals from all final dispositions of the District Courts of the United States. United States

District Court for the District of Hawaii is a District Court of the United States within the purview of the statutory section just cited.

Statement of the Case.

The appellant in the instant case, B. A. Williams, II, is a citizen of the United States of age 30 years without prior criminal convictions. Since his discharge from the Intelligence Branch of the Air Force in 1953 and at all times pertinent to this appeal he has been engaged primarily in the independent oil producing business in the Western continental United States and Hawaii. Prior to his military service he had been employed to buy gas and oil leases by several major oil companies.

During the years 1957 and 1958 appellant was engaged in such business, both individually and through a Colorado corporation, organized and owned by him and known as Petroleum Corporation of America, hereinafter referred to as the Corporation. During this period appellant maintained his main offices in Denver, Colorado, with branch offices in Seattle, Washington, and Honolulu, Hawaii.

More specifically, and with particular reference to his business activities in Seattle and Honolulu, appellant sold working interests in the drilling of oil wells under leases owned by appellant and/or the Corporation to investors in the named areas [Record, pp. 20-21, 100-102]. In connection with these activities appellant maintained personal and Corporation checking accounts in the Bank of Hawaii main branch in Honolulu [Record, p. 22], a Corporation account in the Seattle First National Bank, Seattle [Record, p. 75], and personal and Corporation accounts in the United States National Bank of Denver [Record, pp 92-93].

During the period in late April and early May of 1958, pertinent to this appeal, one Dominick S. Ranieri was

resident manager of appellant's Honolulu office [Record, p. 20], and one Ralph Purvis was resident manager of appellant's Seattle office [Record, p. 110]. A Mr. Warren P. Doing was co-manager of the Seattle office [Record, p. 130].

In 1957 and prior to April 1958 appellant and Corporation had been engaged in extensive oil drilling operations primarily in the State of North Dakota [Record, pp. 106, 119]. Appellant had contracted with one Gates to furnish the supplies and equipment necessary for such drilling operations [Record, p. 107]. Appellant himself was spending considerable time in Hawaii selling working interest to investors there during this period [Record, p. 106].

Appellant paid Gates his contract price to furnish the well equipment (approximately $30,000.00), but Gates failed to pay his suppliers who thereupon filed liens against appellant's lease-hold interests in North Dakota [Record, pp. 107-109]. In order to raise funds to release such liens by selling some of appellant's interests in already producing wells, appellant opened an office in Seattle through Doing and Purvis [Record, pp. 109-110].

On or about April 24, 1958, Doing advised appellant that some $46,000.00 worth of interests had been sold in the Seattle area and that he, (Doing), was about to collect these funds. Doing inquired as to what he should do with such funds. Appellant advised Doing to deposit the funds in the Corporation account in the Seattle First National Bank and that appellant would then transfer such funds to Honolulu [Record, p. 111]. This appellant did by drawing Corporation checks on the Seattle Bank totalling $44,000 and depositing such checks to appellant's account through appellant's manager Ranieri in the Bank of Hawaii in Honolulu [Record, pp. 112 and 47]. Appellant then, under extreme pressure from creditors, and

relying on the fact of Doing's deposit in Seattle, wrote a number of checks on the Hawaii Bank [Record, pp. 112-113, 122-126].

However, Doing did not make the deposit on April 24, 1958, as appellant had believed, because of certain legal requirements encountered by Petroleum Corporation of America, a Colorado corporation, in entering to do business in the State of Washington [Record, p. 114]. Anticipating return of the Seattle checks deposited in the Bank of Hawaii and of the various checks to creditors because of the failure of the Seattle deposit appellant made every effort to sell all his available leases [Record, p. 115] and to borrow funds to meet said checks [Record, pp. 114-115]. Appellant also wrote checks on and made various deposits in the several accounts hereinabove described in an effort to keep returned items at a minimum until funds were available to cover all checks deposited and written in favor of creditors [Record, pp. 114, 117]. Nevertheless, the net result was an overdraft at Bank of Hawaii of approximately $50,000.00 by on or about May 15, 1958 [Record, p. 49].

At no time was appellant ever instructed by any of the banks involved not to write checks against checks deposited therein until the latter had cleared. Nor is there any dispute as to the fact that appellant's personal account and Corporation's account were used interchangeably in appellant's business and with full knowledge and approval of appellant's investors [Record, p. 123].

Neither the Seattle Bank nor the Denver Bank suffered any financial loss whatever by reason of the foregoing transactions [Record, pp. 89, 96]. Nor did appellant realize any personal gain, benefit or profit whatever therefrom.

Bank of Hawaii was kept fully informed by appellant and his manager, Mr. Ranieri, at all times as to appellant's vigorous efforts to cover the overdraft there [Record,

pp. 65-66]. Through appellant's efforts and on June 26, 1958, Bank of Hawaii was reimbursed in full [Record, p. 68].

In October 1958 appellant was indicted by a Federal Grand Jury in Honolulu for violation of 18 U. S. C. A. 1341—Mail Fraud. Appellant later waived indictment [Record, p. 3] and proceeded to trial by information [Record, pp. 4-8].

The information upon which appellant was tried consisted of six separate counts charging appellant with devising a check kiting scheme to defraud involving Denver, Seattle and Hawaii banks and causing checks to be placed in the mail for the purpose of executing such scheme. The information did not follow the specifications of the statute in a number of particulars to be detailed and discussed in the Argument, pages 8-12, *infra,* this Brief.

After trial to a jury on February 2 and 3, 1959, in the District Court of the United States for the District of Hawaii, Honorable Jon Wiig presiding, defendant was found guilty on all six counts [Record, p. 9]. Motions to set aside the verdict of the jury or in the alternative for a new trial and a motion to dismiss the information were denied [Record, pp. 9-11]. Thereafter, and on April 3, 1959, [Record, pp. 11-13] defendant was adjudged guilty and was sentenced to six months imprisonment and fined $1,000 as to each of counts I, II, III, IV and V, the sentences to run concurrently, the execution thereof suspended and appellant placed on probation for five years. As to count VI, imposition of sentence was suspended and appellant placed on probation for five years. The periods of probation as to each count were to run concurrently. The above fines were to be paid within 90 days, otherwise the appellant to stand committed until payment. Jurisdiction of the case and supervision of probation was trans-

ferred to the United States District Court for the District of Colorado, the District of appellant's then residence.

Notice of appeal was timely filed together with transcript of record in the District Court for the District of Hawaii and specification of points relied upon by appellant in the taking of this appeal [Record, pp. 153-154].

Arthur A. Brooks, Jr. of Los Angeles, California, entered his appearance in this Court as counsel for appellant on November 25, 1959. Mr. Brooks was not associated with trial counsel Mr. O'Neill and Mr. Andrews of Denver, Colorado, in the proceedings had below.

Questions Involved.

1. Does the information sufficiently charge an offense under 18 U. S. C., Sec. 1341, or is it fatally defective because it omits the element of knowledge on the part of appellant that he caused delivery of checks through the mails by omission in the information of the statutory term "knowingly"?

2. Does the information sufficiently charge an offense under 18 U. S. C., Sec. 1341, or is it too vague and uncertain in that it cannot be determined therefrom whether appellant is charged with placing and/or receiving fraudulent matter in or from the mails or knowingly causing delivery thereof through the mails?

3. Is the evidence sufficient to show that appellant devised a fraudulent scheme?

4. Is the evidence sufficient to show that appellant knowingly used the mails or caused their use in the execution of a fraudulent scheme?

5. If appellant devised a fraudulent scheme to obtain fictitious bank credit was such scheme completed before the mails were used?

6. Did the trial court err as a matter of law in refusing to grant appellant's judgment of dismissal or in the alternative for a new trial on the grounds above specified?

7. Did the trial court err as a matter of law in failing to grant appellant's motion to dismiss the information?

Specification of Errors.

1. The trial court erred as a matter of law in refusing to dismiss the information on appellant's motion because the information is fatally defective in that it failed to charge appellant with *knowingly* causing the delivery of checks through the mails.

2. The trial court erred as a matter of law in refusing to dismiss the information because the information is too vague and uncertain to apprise appellant of the crime with which he was charged in that it cannot be determined therefrom whether appellant is charged with placing and/or receiving fraudulent matter in or from the mails or knowingly causing delivery thereof through the mails.

3. The trial court erred as a matter of law in failing to grant judgment of dismissal at the conclusion of the government's case because the evidence was insufficient to show that appellant devised a fraudulent scheme.

4. The trial court erred as a matter of law in failing to grant judgment of dismissal at the conclusion of the government's case because the evidence was insufficient to show that appellant knowingly used the mails or caused their use in the execution of a fraudulent scheme.

5. The trial court erred as a matter of law in failing to grant judgment of dismissal or motion for a new trial at the conclusion of the case because the evidence showed that appellant's fraudulent scheme, if any, was completed before the checks involved were sent through the mails.

ARGUMENT.

I.

THE INFORMATION HERE IS FATALLY DEFECTIVE BECAUSE:

A. It Failed to Charge Appellant in the Statutory Language With Knowingly Causing Delivery of Checks Through the Mails and:

B. It Is Too Vague and Uncertain to Apprise Appellant of the Exact Nature of the Crime With Which He Is Charged in That It Cannot Be Determined Therefrom Whether Appellant Is Charged With Placing and/or Receiving Fraudulent Matter in or From the Mails or Knowingly Causing Delivery Thereof Through the Mails.

A. The information may be attacked at any time. Rule 12 (b) (2), *Federal Rules of Criminal Procedure.* The question of the sufficiency of an indictment (or information) may be raised after plea, sentence or judgment. *United States v. Calhoun,* 257 F. 2d 673 (1958).

Appellant, as heretofore pointed out, was charged with six counts of violation of 18 U. S. C. 1341, formerly 18 U. S. C. 338. The statute provides as follows:

> "Section No. 1341. Frauds and swindles.
>
> "Whoever, having devised or intending to devise, any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious

> article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or *knowingly* (emphasis ours) causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than 5 years, or both."

From an examination of the information [Record, pp. 4-8] it is evident that the alleged violation set forth in each count involved the same mechanics. The counts differ from one another only in dates and amount of checks, checking accounts utilized, and drawee and depository banks. All counts employ the language ". . . for the purpose of executing such scheme and artifice (appellant) caused to be placed in a post office." In none of the counts is the statutory term *knowingly* employed between the words "artifice" and "cause". It is submitted that failure to use such statutory term renders the information fatally defective in the instant case.

United States v. Ball, 294 Fed. 750, involved an indictment for violation of former section 338 of 18 U. S. C. where it was alleged defendants sent a false statement of their financial condition through the mails. It was held that a failure to allege the knowledge of defendants as to the truth or falsity of the statement made was fatal, such omission being of matter of substance, and not a defect or imperfection in matter of form only.

By necessary implication the case of *Wilkes v. U. S.*, 80 F. 2d 285 (1935), emphasizes the necessity of the allegation of *knowingly* causing the use of the mails. At page 288 this Court stated:

> "It is further argued by these appellants that if count 12 be regarded as attempting to charge the offense of causing delivery of the letter in question, it is defective in not alleging that the defendants 'knowingly' caused such delivery. The point is not well taken. Count 12 alleges that the defendants 'did * * * knowingly * * * cause to be placed in the U. S. Post Office * * * and cause to be delivered by the Post Office establishment of the U. S.,' the letter therein referred. This means that both acts (causing the letter to be mailed and causing it to be delivered) were done knowingly. In so alleging, it was not necessary to use the word 'knowingly' twice. *Once was enough.*" (Italics ours.)

It is clear from the Record [pp. 4-8] that the government failed to use the vital word *knowingly* even once in the case at bar.

Although not involving the mail fraud statute two recent cases decided in the Tenth Circuit support appellant's contention here. *Robinson v. U. S.*, and *Burley v. U. S.*, 263 F. 2d 911 (1959) involved unlawful trafficking in Narcotics under 21 U. S. C. A. 174. Trial court convictions were reversed and it was held that an indictment charging an offense under the Narcotics, Drug, Import and Export Act must allege that the accused knew that contraband was imported or brought in to the United States contrary to law and an indictment which failed to make such essential allegation failed to state a public

offense, and such defect could not be regarded as harmless error. (Citing *Calhoun,* page 8, *supra*).

Appellant concedes that there are authorities holding the use of the word *knowingly* unnecessary in charging a defendant with depositing letters in the mails "where that is necessarily implied from the other averments." *Samuels v. U. S.,* 232 Fed. 536. However, such cases, it is submitted, are distinguishable from the case at Bar on the ground that here there can be no implication of knowledge on the part of appellant that the mails would be used from the other averments in the information. It is further submitted that charging a statutory crime by implication is not entirely in accord with established procedures of Anglo-American jurisprudence.

B. But the information here [Record, pp. 4-8] is subject to attack on the further ground of vagueness and uncertainty. From a reading of the Six Counts therein contained appellant could not apprise himself of the exact nature of the charges against him.

An analysis of the language of the statute as set forth above (pages 8-9, *supra*) shows that the statute covers two situations where a defendant devises a scheme to defraud. These two situations are as follows:

(1) Where a defendant places or receives matter connected with a scheme in or from a mail depositary or,

(2) "knowingly" causes delivery of such matter by mail.

The information here does not employ the precise language of either of the above two statutory situations but confuses the two by charging that defendant "caused to be placed in a depositary for mail matter, 2 checks, etc". The statute clearly requires that a defendant be charged

with either placing or receiving fraudulent matter in or from a mail depositary *or knowingly* causing delivery of such by mail. The information here charges neither in clear and understandable terms. The appellant is entitled to know precisely with what statutory violation he is charged. It is, therefore, urged that the information here must fail on the grounds of vagueness and uncertainity in addition to the Government's failure to allege that appellant knowingly caused delivery through the mails as discussed hereinabove.

Under the evidence as will be developed below, it is clear that at most there was only a technical violation of section 1341 rather than an intentional one. There is not a scintilla of evidence that defendant realized any personal gain in any of the transactions described in the information. Thus, *a fortiori,* the information should be sufficient in all particulars and comply exactly with the offense contemplated by the statute.

II.

The Evidence Presented by the Government Was Insufficient to Support the Verdict in That It Failed to Show Beyond a Reasonable Doubt That Appellant Had Devised a Fraudulent Scheme.

It is true as set forth in the instructions of the Court to the jury [Record, pp. 151-152] that it is not necessary to prove a violation of the mail fraud statute that a fraudulent scheme, once devised, succeed, or that the defendant obtain any money as a result of such scheme. However, evidence showing that defendant obtain no monetary benefit from the transactions involved and that no banking institution or anyone else suffered any financial loss whatever raises a strong inference that there was no

fraudulent scheme devised by appellant nor did he at any time harbor any intent to defraud anyone. The following testimony from the record below clearly supports this position:

Testimony of Government witness Dominick S. Ranieri [Record, p. 34]:

> "Q. Mr. Williams did tell you at the time that you made these Bank of Hawaii deposits that in terests had been sold and there was money in the Seattle Bank, is that right? A. Yes, sir.
>
> Q. And that he had been told by his manager up there that these interests had been sold? A. Yes, sir."

Testimony of Government witness Carl R. Klenske [Record, pp. 65-66]:

> "Q. Now Mr. Klenske, in connection with this, weren't you kept notified at all times that Mr. Williams was attempting to put the money in the bank in Denver through Mr. Ranieri and others? A. Yes, I say that I have been repeatedly told.
>
> Q. They kept you fully advised of it? A. By Mr. Ranieri, well, solely by Mr. Ranieri but he would quote Mr. Williams since I had not met him, that he was trying to raise the money and it was coming from Seattle or from Denver. That is true.
>
> Q. In other words, they never attempted to keep anything from you? They simply said they didn't have the money at the time but they were desperately trying to get it to cover that check? A. They told me that they were making every effort to cover that check, that is true."

[Record, pp. 67-68, 70]:

"Q. Also, didn't he send funds or authorize funds from his personal account to be applied against this overdraft? We will put it this way: Weren't funds from his personal account applied against this overdraft? A. Yes. The balance that existed in the personal account was applied to this overdraft.

Q. In other words, the bank has been reimbursed in full? A. In full, that is correct.

Q. In other words, he was going to take care of all the money, that the oil returns were to be paid to the investors here and these lease sales were to be assigned to the bank as security for this money? A. That's right."

Testimony of Government witness Philip V. Taggart [Record, p. 89]:

"Q. Now, the Bank of Seattle is not out one cent as a result of this transaction, are they? A. No.

Q. They have never lost one penny, have they? A. No."

Testimony of appellant, B. A. Williams II [Record, pp. 118, 121]:

"Q. Did you ever obtain anything at all from the proceeds of these checks yourself? A. Actually no, because there was other money put in all of these accounts during this time. We opened the account in Seattle with $5,000 of our own money. And I bought about $4,000 worth of furniture and office equipment to open the Seattle office with. Of course, all the travelling expenses. So actually I didn't derive anything out of this $50,000, no.

Q. Out of the entire thing? A. No.

Q. And did you ever at any time during this whole transaction ever intend to cheat or defraud anybody in connection with this? A. I certainly did not.

Q. You did everything you possibly could to keep them advised and let them know what was going on in the situation? A. I did. I called Ranieri up every day during the course of the situation and told him to do different things, to call Mr. Klenske and advise him that we certainly weren't running out on anybody. It was an unfortunate situation that happened and we were going to get it straightened out as quickly as possible, as quickly as we could.

Q. And eventually it was done? A. That is true."

III.

The Evidence Presented by the Government Was Insufficient to Support the Verdict in That It Failed to Show Beyond a Reasonable Doubt That Even if Appellant Had Devised a Fraudulent Scheme He Knowingly Used the Mails or Caused Their Use in the Execution Thereof.

As stated in *United States v. Browne,* 225 F. 2d 751 (1955) page 757: "In any event, it is not the scheme to defraud which the Federal statute condemns but only the use of the mails in its execution. It is that use which constitutes the corpus delicti of the offense."

Under the assumption, not granted by appellant here, that any of the checks introduced into evidence were used in connection with a fraudulent scheme there is no positive evidence whatever that appellant knew or intended that such checks be sent through the United States mails. Such use was purely mechanical on the part of the sev-

eral banks involved. Certainly other modern means of transmittal, such as air express, might well have been contemplated by one in Appellant's shoes, assuming one in his shoes would contemplate any particular means of transmittal at all, a doubtful assumption at best.

This case, indeed, bears no similarity on its facts to the usual "check-kiting" cases involving, *inter alia,* the use of fictitious names and the swindling of innocent parties. *e.g., United States v. Fromen,* 265 F. 2d 704.

That a verdict may be set aside for insufficiency of the evidence to establish the elements of the offense can not be doubted. *Graves v. U. S.,* 252 F. 2d 878 (1958).

IV.

Under the Evidence Here It Can Be Argued That the Fraudulent Scheme, if Any, Was Completed Before the Mails Were Used and in Such Case There Is No Federal Offense.

Assuming, but not admitting, that appellant did devise a fraudulent scheme to obtain fictitious bank credit it is contended that under all of the evidence such scheme was completely executed upon the deposit of the first two checks totalling $44,000 in the Bank of Hawaii on April 25, 1958 [Record, p. 47]. This was the deposit which led to all subsequent transactions [Record, p. 63] and which was ultimately and within a very short time covered and paid in full by appellant [Record, p. 68].

In *Kann v. U. S.,* 323 U. S. 88 (1944), it is stated:

> "The case is to be distinguished from those where the mails are used prior to, and as one step toward, the receipt of the fruits of the fraud, such as *United States v. Kenofskey,* 243 U. S. 440. Also, to be distinguished are cases where the use of the mails is a means of concealment so that further frauds which

are part of the scheme may be perpetrated. In these the mailing has ordinarily had a much closer relation to further fraudulent conduct than has the mere clearing of a check, although it is conceivable that this alone, in some settings, would be enough. The Federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate State law." See also *Dyhre v. Hudspeth,* 106 F. 2d 286 (1939), and *United States v. McKay,* 45 Fed. Supp. 1001 (1942).

It is submitted that under the foregoing authorities the scheme, if any, here was fully completed before the United States mails became involved and consequently no Federal offense was committed.

Conclusion.

Summing up, reversal of the conviction here is urged primarily on the grounds of failure of the information to employ the necessary statutory language in charging the offense of mail fraud and on the insufficiency of the evidence to support the elements of the crime of mail fraud, to wit: A scheme to defraud devised by appellant and the knowing execution of that scheme by use of the mails.

Viewing the record as a whole, it is clear that foolish and careless though appellant Williams may have been, fraudulent he was not.

For the foregoing reasons it is respectfully submitted that the judgment below should be reversed.

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